UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff, vs. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual, Defendants	)	C.A. No. 00-2041 Judge William L. Standish

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO THE LIABILITY OF CHARLESVON BERNUTH

AND NOW, comes WRS, Inc., d/b/a WRS Motion Picture Laboratories, a corporation, by its counsel, Thomas E. Reilly, Esquire, with the following Brief in Opposition to Motion of Defendant, Plaza Entertainment, Inc. to Set Aside Default Pursuant to Fed.R.Civ.P. 55(c) filed by Defendant, Plaza Entertainment, Inc. pursuant to the Court's Order of May 11, 2001, as follows:

I. INTRODUCTION

WRS commenced this action seeking to recover from von Bernuth as guarantor of Plaza approximately $1.4 million dollars arising from services rendered and goods supplied on behalf of Plaza. WRS has moved for Summary Judgment as to von Bernuth's liability as guarantor.

II. STANDARD OF REVIEW

In considering a Motion for Summary Judgment, the Court must view the facts in a light most favorable to the non-moving party. Doe v. County of Centre, 242 Fed.3rd

437 (3rd Circuit 2001). Summary Judgment may be appropriately entered only where there is no genuine issue of material facts and the moving party is entitled to Judgment as a matter of law. F.R.C.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed 2nd 265 (1986). Where the appropriate record exists, the Court may not only deny the moving party's Motion for Summary Judgment, but may also enter Judgment for the non-moving party. CW Gov't Travel, Inc. v. United States, 63 Fed. Cl. 459; (2005). WRS respectfully submits that there is no genuine issue as to a material fact as to von Bernuth's liability as guarantor and that Judgment for liability should be entered in favor of WRS and against von Bernuth.

II. FACTUAL BASIS FOR WRS CLAIM AGAINST von BERNTUH

WRS claim against von Bernuth is premised upon the Services Agreement that he admitted signing. That document specifically states "This SERVICES Agreement between WRS, Inc.("WRS") and Plaza Entertainment, Inc. and its principals-Eric Parkinson, Charles von Bernuth and Thomas Gehring is made as of this 12th day of October 1998". This defined the parties to the agreement distinctly as the corporation, Plaza, and the individual principals of Plaza. Although a signature line was present for Gehring, he apparently never signed the agreement. However, each of the other parties signed. Plaza by Parkinson its president, von Bernuth as principal and Parkinson separately signed as principal.

With respect to the commitment of the principals, Paragraph 6 of the agreement entitled: Security interest; Financial information; Guaranty", stated:

> As further inducement to WRS to enter into this agreement, each of the principals hereby guaranties the performance of Plaza of its obligations under the terms of this agreement , including the payment of the WRS receivable and NEW Invoices and any other charges, expense(including reasonable attorneys fees) and cost reasonably incurred by WRS in any proceeding to enforce any of the terms of this Agreement, (collectively , the "collection Expenses")

III. ARGUMENT

A. Charles von Bernuth committed to pay the debt owed by Plaza to WRS

The services Agreement does not contain the language prescribed by 8 P.S.§1, which states:

> Every written agreement hereafter made by one person to answer for the default of another shall subject such person to the liabilities of suretyship, and shall confer upon him the rights incident thereto, unless such agreement shall contain in substance the words: "This is not intended to be a contract of suretyship," or unless each portion of such agreement intended to modify the rights and liabilities of suretyship shall contain in substance the words: "This portion of the agreement is not intended to impose the liability of suretyship.

Absent the specified language, von Bernuth is directly, immediately, and jointly liable for the obligation of the principal. Crestar Mortg. Corp. v. Peoples Mortg. Co., Inc., 818 F.Supp. 816, (E.D. Pa. 1993). Thus, the language of the services agreement as a matter of law obligated von Bernuth directly and immediately to WRS to pay the debt of Plaza to WRS.

As a surety von Bernuth's obligation is subject to discharge by a material modifications of the debtor/creditor relationship to which the surety did not consent. Continental Bank v. Axler, 353 Pa.Super 409, 510 A.2d 726 (1986). Schroyer v. Thompson, 262 Pa.Super 282, 105 A.2d 274 (1918). It may also have been affected by the creditor's lack of diligence with respect to its handling of collateral within its control. First National Consumer Discount Co. v. McCrossan, 336 Pa. Super 541486 A.2d 396(1984). Defendant von Bernuth has not alleged any such modification or discharge of his obligation by the conduct of WRS. Rather, von Bernuth has claimed that his signature on the Services agreement did not personally obligate him to pay the debt and asserted as Affirmative Defenses: Accord and Satisfaction, Estoppel, Payment, Release, and Lack of Consideration. WRS submits that none of these asserted contentions are meritorious

B. Von Bernuth's signed the agreement personally and is personally obligated.

The Pennsylvania Supreme Court has stated:

> A person of age is presumed to know the meaning of words in a contract, and if, relying upon his own ability, he enters into an agreement not to his best interest, he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument which he signed. Shoble v. Shoble, 349 Pa. 408, 37 A.2d 604, 605 (1944).

Simple failure to read a contract does not, in the absence of proof of fraud, justify the avoidance, modification and nullification of the contract. Estate of Brant, 463 Pa. 230, 344 A.2d 806 (1975).

The situation presented by von Bernuths first contention is similar to that faced by the Pennsylvania Superior Court in Denlinger, Inc. v. Dendler, 415 Pa.Super. 164, 608 A.2d 1061 (1992), where a corporate president signed a credit application for the corporation which, pursuant to the terms and conditions of the reverse side, provided that the party signing for the corporation would personally guarantee the debt. Refusing to reverse the judgment against the corporate president for the debt of the corporation, the Court said the corporate president was "legally bound to know the terms of the contract in which he himself engaged." Montgomery v. Levy, 406 Pa. 547, 177 A.2d 448 (1962). Moreover, "contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodies reasonable or good bargains (citation omitted) *ignorantia non excusat*." Simeone v. Simeone, 525 Pa. 392, 581 A.2d 162 (1990). Thus, absent any other facts invalidating or otherwise discharging the terms and conditions of von Bernuth's promise under the Services Agreement, clearly govern the transaction.

Von Bernuth appears to contend that Plaza did not have an obligation to pay WRS directly for the services rendered and product created on its behalf. Unfortunately, both the terms and conditions pleaded as part of Exhibit “A”, the Credit Application, admitted by von Bernuth, and the Services Agreement pleaded as Exhibit “D” contain provisions that require Plaza to make payment directly to WRS for its invoices. Specifically, on the “Terms of Payment” section of the “Terms and Conditions” attached to the Account Agreement, it states:

> Customer agrees to pay company for all services performed and materials supplied to customer within thirty (30) days after such items are invoiced.

In addition, that section states:

> Customer agrees to pay all costs and expenses incurred by company in connection with the enforcement of any company’s rights hereunder, including company’s right to the collection from customer of any sums due or to become due at any time from customer. Including the terms “costs and expenses”, customer agrees to pay actual attorneys fees which the customer agrees shall be deemed to be fair and reasonable.

Similarly, the Services Agreement provides as follows. In the section entitled “Administrative Services”, the Services Agreement states:

> WRS shall provide Plaza with a monthly statement setting forth the fees and expenses incurred on behalf of Plaza during each month, each of which shall be paid directly by Plaza to WRS within thirty (30) days of the statement date. In the event any invoice remains unpaid after thirty (30) days, WRS shall have the right to instruct the bank to make payment of such invoice to WRS from the funds in the lockbox account.

The Services Agreement does provide a method by which payments into a lock box were to be distributed among WRS and Plaza, however, if also indicated that no “New Invoice” would remain unpaid for a period of longer than 89 days. Exhibit “D” Section 1.1)

Therefore, contrary to the assertions in the von Bernuth's Answer, Plaza did have an obligation to pay directly to WRS for its services, both under the terms and conditions of the Account Application and under the Services Agreement.

In fact, the Services Agreement clearly anticipated that Plaza would pay for the New Invoices and the "Receivable" because it provided an incentive in Section 1.2 if the Plaza would become current on "all outstanding invoices." Finally, whether Plaza was to pay its invoices or pay through collection of its receivables through the lock box, if what Plaza owed to WRS was not paid, von Bernuth committed to pay it directly and immediately to WRS by signing the Services Agreement.

C. Charles von Bernuth's Affirmative Defenses are not meritorious

1. Accord And Satisfaction

Accord and satisfaction does not extinguish the original obligation. Gordon Brothers, Inc. v. Kelly, 92 Pa.Super. 485 (1927). Rather, in an accord and satisfaction it is the performance of the new agreement which satisfies the original obligation. Paramount Aviation Corp. v. Augusta, 178 F.3d 132 (1999); Lazzoratti v. Juliano, 322 Pa.Super. 129, 469 A.2d 216 (1983). When the accord is breached, the other party has a choice to either enforce the original obligation or the breached accord. Zhager v. Gubernick, 205 Pa.Super. 168, 208 A.2d 45 (1965).

Von Bernuth does not aver exactly what agreement constituted the "accord" that he entered into with WRS. Presumably the Accord was the Services Agreement. However, the services Agreement could not have been an accord with respect to von Bernuth's personal liability because the Services Agreement is the document that created his personal promise to pay the debt of Plaza to WRS rather than extinguishing his liability. Further more, the "satisfaction" required to complete the accord and satisfaction has not occurred since the debt of WRS has not been paid. Thus, The Affirmative Defense of Accord and Satisfaction does not relieve von Bernuth of the liability undertaken as a party to the Services Agreement.

2. Estoppel

Von Bernuth Plaza asserts that the rights granted to WRS under the Services Agreement estops WRS from pursuing its claim against Plaza. While this may simply be a different reiteration of the "accord and satisfaction", it is not clear what particular doctrine of estoppel von Bernuth relies upon. Equitable estoppel arises when "one, by its acts, represents or omissions, or by its silence when it ought to speak, intentionally, or through culpable negligence, induces another to believe a certain set of facts to exist, and such other rightfully relies and acts upon such belief so that he will be prejudiced if the former is permitted to deny the existence of such facts." Northwest National Bank v. Commonwealth, 345 Pa. 192, 27 A.2d 20 (1942).

The premise of this defense seems to be that because Plaza and von Bernuth entered into the Services Agreement, WRS should not be entitled to collect a claim from von Bernuth pursuant to his promise contained in the agreement. No representation of fact was allegedly made by WRS which it seeks now to deny. Rather, WRS entered into the Services Agreement under the belief that Plaza had accounts receivable in place with Plaza customers which would be sufficient to bring the amounts owed to WRS by Plaza less than sixty (60) days delinquent (See Exhibit "D"). Based upon this belief, WRS provided additional services to Plaza which increased its indebtedness from $680,000.00 at the time the Services Agreement was signed, to $1.4 million at the time this action was instituted. While von Bernuth would suggest that WRS' right to collect its accounts receivable should estop it from bringing this action, Plaza has failed to identify either payments made by its customers into the lockbox contemplated under the Services Agreement, or the availability of collectable accounts receivable, the existence of which it represented to WRS to induce its additional extension of credit. Estoppel does not provide von Bernuth with a meritorious defense.

3. Payment

Under Pennsylvania law, the party who is asserting the defense of payment has the burden of establishing payment by clear and satisfactory evidence. United States Savings & Trust Company v. Helsel, 322 Pa. 433, 2 A.2d 823 (1938). Like the defenses of accord and satisfaction, which require von Bernuth to establish performance, and the apparent defense of estoppel, which is premised upon the existence of viable accounts receivable and the receipt of payment by WRS, payment requires specific allegations that customers of Plaza made payment to WRS, for which WRS has failed to give credit to Plaza. Von Bernuth fails to include these facts. It is only the receipt by WRS of funds from Plaza's customers which may be asserted to support payment as a meritorious defense. Because von Bernuth's pleading fails to contain any such factual averment, no meritorious defense of payment has been established.

Furthermore, the amount of the debt will be resolved by the accountants retained to verify the damages claimed by WRS.

4. Release

A release is a form of contract which the party asserting the existence of the release has the burden to establish the existence of the release. In discussing releases, the Pennsylvania Supreme court in Taylor v. Solberg, 566 Pa. 150, 778 A.2d 664 (2001)

> In Pennsylvania, it is well settled that the effect of a release is to be determined by the ordinary meaning of its language. Republic Ins. Co. v. Paul Davis Systems of Pittsburgh South, Inc., 543 Pa. 186, 670 A.2d 614, 615 (Pa. 1995); Buttermore v. Aliquippa Hospital, 522 Pa. 325, 561 A.2d 733, 735 (Pa. 1989). Parties with possible claims may settle their differences upon such terms as are suitable to them. Buttermore, 561 A.2d at 735. They may agree for reasons of their own that they will not sue each other, or anyone else, for the event in question. Id. When the parties to a release agree not to sue each other or anyone else for a given event, this can effect a discharge of others who have not contributed consideration for the release. 561 A.2d at 735-36. This is true even if the language of the release is general, releasing, for example, "any and all other persons" rather than specifically naming the persons released. See Republic Ins. Co., 670 A.2d at 615. However improvident the release may be or subsequently prove to be for either party, their agreement, absent fraud, accident or mutual mistake, is the law of their case. Buttermore, 561 A.2d at 735. If such a release can be nullified or circumvented, then every written release and every written agreement of any kind, no matter how clear and pertinent, can be set aside whenever one of the parties changes its mind or the injured party receives an inadequate settlement. 778 A.2d at 667

Again, von Bernuth does not clearly state the document he relies upon as creating the release. Presumably it is the Services Agreement. IT is illogical for von Bernuth to claim that he is released from liability in by the very document in which he undertakes the liability to be responsible for the Plaza debt. Reviewing the ordinary language of the Services agreement, nothing is found that express, imply or from which an inference could be drawn of WRS intent to release von Bernuth from his undertaking to answer for the Plaza debt. Therefore, there is no merit to the Affirmative Defense of Release.

5. Lack of Consideration

Von Bernuth signed the services Agreement that recites that the mutual promises among the parties is consideration for Services Agreement. In In Re Estate of Rony, 443

Pa. 454, 277 A.2d 791 (1971) The Pennsylvania Supreme Court addressed whether mutual promises are sufficient consideration to make an agreement an enforceable contract. There the Court stated

> It is a general principle of law which has existed for centuries that mutual promises are binding upon the parties thereto and furnish valid consideration. Section 103, Williston on Contracts (3d Ed. 1957); § 75, Restatement of the Law, Contracts; 8 P.L.E., Contracts, § 45; Jessup & Moore Paper Co. v. Bryant Paper Co., 283 Pa. 434, 129 Atl. 559; Gredler Estate, 361 Pa. 384, 65 A. 2d 404; Rosciolo Estate, 434 Pa. 461, 258 A. 2d 623; Kaplan **[***7]** v. Kaplan, 25 Ill. 2d 181. 8 P.L.E., Contracts, § 45, states: "Mutual promises afford sufficient legal consideration for the support of each other, and the mutual promises of the parties are sufficient to create a binding contract." In Jessup & Moore Paper Co. v. Bryant Paper Co., 283 Pa., supra, this Court said (page 441): "'Where there is no other consideration for a contract, mutual promises must be binding on both parties.'" In Gredler Estate, 361 Pa., supra, we pertinently said (page 387): "These mutual promises, made by the parties in the presence of a witness, (cf. Moffitt v. Moffitt, 340 Pa. 107, 16 A. 2d 418) constituted an enforceable contract."

The Services Agreement is not simply a document in which von Bernuth promised to answer for Plaza's debt to WRS. It is a more comprehensive document in which WRS committed to supply administrative services to Plaza, to extend additional credit to Plaza for duplication and fulfillment of orders and for WRS to participate with Parkinson and von Bernuth in efforts to use WRS's connection with the National Bank of Canada to obtain financing for Plaza. These mutual promises are sufficient consideration to make von Bernuth's promise to guaranty payment of Plaza's debt a binding and enforceable contract. Thus lack of consideration is not a meritorious defense to WRS claim against von Bernuth.

IV. CONCLUSION

Based upon the foregoing, WRS, Inc. respectfully submits that there are no genuine issues of material fact pertaining to the commitment of Charles von Bernuth to guaranty payment of the Plaza Debt to WRS. Therefore, WRS respectfully submits that it is entitled to Summary Judgment against Charles von Bernuth as to his liability for the Plaza debt to WRS and WRS respectfully requests that the Court enter Summary Judgment in its favor.

Respectfully submitted,

THOMAS E. REILLY, P.C.

/s/ Thomas E. Reilly

Thomas E. Reilly, Esquire
Pa. I.D. #25832
Attorney for Plaintiff, WRS, Inc.,
d/b/a WRS Motion Picture
Laboratories

2025 Greentree Road
Pittsburgh, PA 15220
(412)341-1600